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81-2360

No.'s ..... and .....

IN THE

Supreme Court of the United States

October Term, 1981

CHARLES D. MOELLER, and LOWELL POWELL,

Petitioners,

VS.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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Question Presented

Does the Due Process Clause of the Fourteenth Amendment require state courts to entertain interlocutory appeal from denial of a defendant's motion to disqualify the prosecutor when the defendant's right to a fair trial has been tainted by the prosecutor's on-the-record statements manifesting conflict of interest and personal bias?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Petitioners Charles D. Moeller and Lowell Powell respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Connecticut. That judgment held not appealable, prior to trial, a denial of motions to disqualify the prosecutor based upon conflict of interest and personal bias manifest on the record.

Opinions Below

The judgment and opinion of the Supreme Court of Connecticut, one Justice concurring, was issued on March 30, 1982, and is reported at 186 Conn. 547, reproduced as Appendix "A." The unreported trial court opinion denying petitioner-defendants' motions to disqualify the prosecutorial authority, dated October 29, 1980, is reproduced as Appendix "B."

Statement of Jurisdiction

The decision of the Supreme Court of Connecticut was rendered on March 30, 1982. The jurisdiction of this Court is invoked under 28 United States Code, §1257(3).

Constitutional Provision Involved

U.S. Const., Amend. XIV:

"... No state shall ... deprive any person of life, liberty, or property, without due process of law ...".

Statement of Facts

In May, 1977, petitioner-defendants Moeller and Powell were charged by the State of Connecticut with conspiring to commit arson regarding a March, 1975 industrial fire. Powell brought a federal lawsuit against State's Attorney Donald A. Browne and two law enforcement officers in the United States District Court in January, 1980.

Powell's lawsuit, pursuant to 42 United States Code §1983, seeks damages of $500,000, and alleges that Browne acted outside and in addition to his quasi-judicial role as prosecutor engaged in discretionary conduct immunized by law; that he acted further as an administrator of the law enforcement officers and as an investigator who actually prepared the affidavit signed by the ostensible affiant which identical affidavit was used to produce all the arrests in the instant consolidated criminal case.[1] Additionally, Powell's suit alleges a material distortion in the preparation of said affidavit and that Browne knew or should have

[1] A third co-defendant has not moved to disqualify the prosecuting authority.

known that one David Bubar, whose autumn, 1976 statements are the linchpin of said bench warrant affidavit, partially renounced and refused to sign "statements" to the law enforcement officers which renunciation was never inquired into through the witness nor made known to the Court issuing the bench warrants. (Bench warrant Affidavit reproduced as Appendix "C.")

The information about Bubar's refusal to sign his statements and his concomitant disavowal of partial contents thereof came to the attention of Powell's counsel in December, 1979. Thus, shortly before the expiration of the applicable statute of limitations as to any action by Powell[1] his suit was filed in January, 1980.[2]

On May 5, 1980, the prosecutor's conflict of interest and personal bias arising from his status as a defendant in Powell's federal action were made manifest when, in urging a June rather than an August or September trial date, he referred directly to his having been sued, and stated:

> . . . I'm entitled to some consideration as far as getting this matter resolved as well. I think the disposition of this criminal case is going to have a very heavy bearing on the disposition of the civil case which has been pending against me. I've been sued for a half a million dollars, and I think it's a matter, if your Honor please, that I'm entitled to an expeditious disposition of that particular case. I don't want to go on the record and make a personal argument to your Honor, but I think that as far as I'm concerned, this is weightier than the

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[1] *See, Williams* v. *Walsh*, 558 F.2d 667 (2d Cir. 1977).

[2] The suit remains pending. A motion to dismiss, filed on behalf of all defendants therein, was denied without prejudice, and the discovery sought by plaintiff Powell has been stayed pending trial of the instant matter.

> request for a continuance for vacations and teaching at seminars and things of that nature. I think it's more important for me to get that civil matter resolved than it is to have counsel go and instruct seminars somewhere or take a vacation. I put that to your Honor's consideration.

Transcript reproduced as Appendix "D," at p. 39a.

This expression of personal concern was noted by defense counsel who suggested that such a feeling might require disqualification. After this comment, Browne made the following remark: "Again, my personal situation is not, I'm not asking your Honor to really give that any consideration. I'm just trying to tell your Honor my position." *Id.* at p. 41a.

The bench warrant affidavit makes abundantly clear that any bias creating the danger of an unfair trial for petitioner Powell logically necessitates that said bias first or simultaneously prejudice petitioner Moeller; the bench warrant demonstrates that Powell's guilt (the result to be protected against if unfairly achieved) cannot logically be pronounced without the foundation pronouncement of Moeller's guilt. Only Moeller is alleged to have motive and to have been the moving force behind the conspiracy.

Reasons for Granting the Petition

The criminal justice system should not be required to first await a tainted conviction and suffer the interim opprobrium occasioned by a conflicted, biased prosecutor failing or appearing to fail to administer a fair trial due to personal motivation.

Because prejudice should not need to be shown in this area, and because further evidence regarding the conflict

and bias as motivating forces would be driven underground by the very existence of the conflict and the motion to disqualify, there is no need to await a judgment on the merits.

The question of the appealability of the denial of a motion to disqualify in a criminal case was specifically left open by this Court in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 372 n.8 (1981).

I.

Interlocutory Review Is Here Consistent With Traditional Civil Guidelines and Required by Criminal Due Process Under the 14th Amendment.

Pursuant to 28 United States Code § 1257, this Court has jurisdiction by writ of certiorari over "[f]inal judgments or decrees rendered by the highest court of a State in which decision could be had. . . ." This section and its federal system counterpart, 28 United States Code § 1291, most often permit appellate review only from a judgment that finally disposes of an action on the merits. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978).

This "final judgment" rule is traditionally given a practical rather than technical construction. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Court recognized that certain "collateral orders" which do not terminate an action on the merits are, nevertheless, "final" judgments for appellate jurisdictional purposes. The doctrine allows review of orders that "finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

This "collateral order" rule as regards decisions on motions to disqualify had led a checkered history[4] until *Firestone Tire and Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), which held non-appealable a denial of disqualification, and which summarized the *Cohen* test as follows: "... '[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' *Id.* at 375 (quoting *Coopers & Lybrand, supra*, at 468).

Denial of a civil disqualification motion satisfies the first prong of the collateral order test. "It conclusively determines the disputed question because the only issue is whether challenged counsel will be permitted to continue his representation." *Firestone, supra*, at 375-76. This is equally so in this criminal case. Even the thrust of the concern raised by *Firestone's* concurring opinion (Rehnquist, J.) regarding the appropriateness and possibility of judicial monitoring through the trial does not affect detrimentally petitioners' claim here. The prosecutor's statement that "... the disposition of this criminal case is going to have a very heavy bearing on the disposition of the civil case which has been pending against me," shows from thence forward the existence and inexorable continuation of prejudice. Thus, it is futile to await "a later point in the proceedings—'When prejudice can be better gauged.'" *Firestone, supra*, at 381 (quoting *United States* v. *MacDonald*, 435 U.S. 850, 859 (1978).

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[4] *See, e.g.*, recent Second Circuit treatment in *Harmar Drive-In Theatre, Inc.* v. *Warner Bros. Pictures*, 239 F.2d 555 (2d Cir. 1956), (orders denying and granting disqualification appealable); *Fleischer* v. *Phillips*, 264 F.2d 515 (2d Cir. 1959), (orders denying disqualification not appealable); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974), (returning to rule of *Harmar, supra*); *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980), (returning to rule of *Fleischer, supra*, at least in a civil suit).

As to *Cohen's* second prong, the *Firestone* Court assumed without deciding "an important issue completely separate from the merits of the action." *Firestone, supra,* at 376. Despite *Firestone's* appropriately strict "assumption without deciding" the "completely separate" issue, it is of course properly to be deemed so where a case requires decision of the question. For example:

> The question whether counsel should be disqualified is a legal issue distinct and separate from the underlying . . . issues involved in this case. It is not so enmeshed in the factual and legal issues, . . . nor of such a nature as to permit fair assessment only after trial as to militate against review at this time.

In re Coordinated Pre Trial Proceedings, Etc., 658 F.2d 1355, 1357 (9th Cir. 1981). The disqualification ruling is clearly collateral to guilt or innocence, thus falling into that "small class . . . too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen,* 337 U.S. at 546.

The third prong of *Cohen's* collateral order test requires that the interlocutory order be "*effectively* unreviewable on appeal from a final judgment." *Firestone, supra,* at 376. (Emphasis added). *Firestone* held that civil orders denying disqualification failed to satisfy this requirement.

An order is "effectively unreviewable" where it involves "an asserted right, the legal and practical value of which would be destroyed if it were not vindicated before trial." *Id.* at 377 (quoting *MacDonald, supra,* at 860). This Court has also cautioned, however, that there exists a "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews* v. *Eldridge,* 424 U.S. 319, 331, n.11

(1976). This principle is particularly applicable where petitioners run the risk of being deprived of liberty, rather than property interests as in *Mathews, supra*, by governmental decisions in the prosecutorial-criminal justice framework. In *Firestone*, the "effectively unreviewable—irreparable harm" claim failed for lack of a "single concrete example of the indelible stamp or taint of which [petitioner] warn[ed]." 449 U.S. at 376.

This petition presents a concrete case of "irreparable harm," and one of constitutional dimension. A prosecutor has myriad duties requiring delicate balance in judgment and discretion; it would be unfair to petitioners and, indeed, to the prosecutor as well, to expect the requisite impartiality from one who is, by his own admission, so personally drawn in. Among the countless duties and decisions totally within the prosecutor's internal decision-making processes, subject to review only if later discovered, are the responsibilities: to lay before the Court all evidence tending to aid in ascertaining the truth, even if such information is inconsistent with the contention of the prosecution;[5] to disclose exculpatory information;[6] to disclose advantages or power held by the government over a witness;[7] to make arrangements and/or disclose any arrangements so made with government witnesses;[8] to correct government witnesses who lie;[9] to make sentence recommendations.[10] Once one adds to the list of pertinent factors

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[5] *Namet* v. *United States*, 373 U.S. 179 (1963).

[6] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[7] *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Alcorta* v. *Texas*, 355 U.S. 28 (1957).

[8] *Giglio* v. *United States*, 405 U.S. 150 (1972).

[9] *Napue* v. *Illinois*, 360 U.S. 264 (1959).

[10] *Santobello* v. *New York*, 404 U.S. 262 (1971).

the prospect of the prosecutor's management of plea negotiations so critical to the criminal justice system,[11] it is readily seen that the question here meets the *Cohen* requirement that the issue be "too important to be denied review," *Cohen, supra,* at 546, resulting in "irreparable harm" because the order will have become "effectively unreviewable." *Firestone, supra,* at 376.

It can hardly be gainsaid that these crucial decision-making powers are unlikely to be utilized fairly here (or appear to be), either because of prosecutorial self-interest, vindictiveness or the appearance of either.

Finally, as noted, the *Firestone—Cohen* tests require that the question presented be "effectively unreviewable" upon traditional appeal, *Firestone, supra,* at 376, or implicate a right which "will have been lost, probably irreparably," if review is deferred until after trial. *Cohen, supra,* at 546. *Firestone* did not involve "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Firestone, supra,* at 377 (quoting *United States* v. *MacDonald, supra,* at 860). In so noting, *Firestone* stated:

> [t]he propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is *normally* only after final judgment. The decision whether to disqualify an attorney . . . will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.

Firestone, supra, at 377. (Emphasis added).

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[11] *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978); *Santobello* v. *New York, supra.*

The conflict—manifest bias question here, however, is, as alluded to *supra*, effectively beyond subsequent more informed review. This is so because of the low visibility that normally attends the earlier noted internal prosecutorial decisions, strategies, actions, or omissions. These decisions and actions will be driven underground, or appear to be, rendering futile any prospect of subsequent discernment.[12]

II.

Interlocutory Review Is Also Appropriate in Order to Avoid Taint to the Entire Criminal Justice System and Its Appearance of Fairness.

In addition to the "irreparable harm" that will befall *petitioners* if appeal must await a judgment on the merits, the taint resulting from the prosecutorial bias severely damages the entire judicial system and its appearance of fairness. Thus distinctions should be drawn concerning motions to disqualify in criminal as opposed to civil litigation.

In *Berger* v. *United States*, 295 U.S. 78 (1935), the Court addressed prosecutorial responsibility:

> [He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore,

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[12] *See, e.g., People* v. *Zimmer*, 51 N.Y.2d 390, 434 N.Y.S.2d 206, 414 N.E.2d 705 (1980), ("the practical impossibility of establishing that the conflict has worked to the defendant's disadvantage."); *Pisa* v. *Commonwealth*, 378 Mass. 724, 393 N.E.2d 386 (1979), ("The formation of the record itself might be affected by decisions influenced by the conflict.").

> in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id. at 88.

The requirement of impartiality "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' (citation omitted), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Thus, while it is true that, assuming a conviction, petitioners can raise the question after trial on the merits, this forced delay will extend the damaging effects of a biased prosecutor far beyond petitioners alone. As this Court has stated, "justice must satisfy the *appearance* of justice," *id.* at 243, to avoid the likely provocation of public suspicion and distrust of the judicial system that would result with a biased prosecutor. To allow this prosecutorial authority, whose conflict and bias is already manifest on the record, to continue participation in this case would dilute the public's faith and confidence in the judicial system. Clearly, then, society's interest in a fair prosecution of the criminal law is an interest "which would be destroyed if it were not vindicated before trial." *MacDonald, supra,* at 860. Here, the threat to the integrity of the judicial system is not merely speculative as in *Firestone.*

It may be argued that appealability would "open the floodgates" to pre-trial appeals. It is the obligation of the judicial system generally, and the prosecutorial authority specifically, to provide a fair, impartial and thorough analysis of matters before it. Bypassing or delaying vindication of such fundamental judicial principles as an accused's

right to a fair trial by an unbiased prosecutor, partially in the name of efficiency, does not serve that purpose.

CONCLUSION

The facts of this case do not rest upon conflict of interest alone. Thus the prospective ruling sought may be restricted to situations where, additionally, *bias* is manifest on the record. A decision herein, limited to the facts of clear conflict and bias as manifested on this record, will guide prosecutions of the future, protect an accused's rights and make appeals unnecessary.

For the foregoing reasons, petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

THOMAS L. NADEAU
ALEXANDER HARINSTEIN
JOHN A. BURGESS

Attorneys for Petitioners

Certificate of Service

This is to certify that three (3) copies of the foregoing Petition For Writ of Certiorari were mailed, postage prepaid, on this 25th day of June, 1982 to Counsel for Respondent, State of Connecticut: Donald A. Browne, Esquire, State's Attorney, 1061 Main Street, Bridgeport, Connecticut.

/s/ THOMAS L. NADEAU

THOMAS L. NADEAU

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PETITIONERS' APPENDIX

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Appendix A

Opinion of the Supreme Court of Connecticut

STATE OF CONNECTICUT v. LOWELL POWELL
STATE OF CONNECTICUT v. CHARLES D. MOELLER
SPEZIALE, C. J., PETERS, PARSKEY, SHEA, COVELLO, JS.

The appeal by the defendants, charged with the crime of conspiracy to commit arson, from the trial court's denial of their motions to have the prosecuting state's attorney disqualified on the ground that he had a personal interest in the outcome of the trial, was dismissed, sua sponte, by this court. The challenged action by the trial court, because it involved a claimed right which could be vindicated on an appeal after the trial, was not a final judgment and thus was not immediately appealable.

The decision in *State* v. *Jones* (180 Conn. 443), to the extent it is inconsistent with the conclusion reached herein, is overruled.

Argued December 3, 1981—decision released March 30, 1982

Motions by each defendant to disqualify the state's attorney of the judicial district of Fairfield and all members of his staff and office, brought to the Superior Court in the judicial district of Fairfield at Bridgeport, where the court, *Eielson, J.*, denied the motions, and the defendants appealed to this court. *Appeals dismissed sua sponte.*

John A. Burgess, of the California bar, with whom, on the brief, was *Alexander Harinstein*, for the appellant (defendant Powell).

Thomas L. Nadeau, with whom, on the brief, was *Theodore I. Koskoff*, for the appellant (defendant Moeller).

Appendix A—Opinion of the Supreme Court of Connecticut

Richard F. Jacobson, assistant state's attorney, with whom, on the brief, was *Donald A. Browne,* state's attorney, for the appellee (state in each case).

SPEZIALE, C. J. The defendants in these two cases are charged with conspiracy to commit arson in connection with the March 1, 1975 fire at plant No. 4 of the Grand Sheet Metal Company, known as the Sponge Rubber Factory, in Shelton. The facts concerning the fire itself are discussed in *State* v. *Just,* —— Conn. (43 Conn. L.J., No. 7, pp. 19, 19-20) (1981), and *United States* v. *Bubar,* 567 F.2d 192, 195-96 (2d Cir. 1976).

The arson was the subject of both federal and state investigations and prosecutions. The defendant Moeller, the president of the company, was indicted on federal charges and, on January 22, 1976, was acquitted following a jury trial.[1] The defendant Powell, the principal financial officer of the company, was not charged by federal authorities. The state charges against Moeller and Powell were initiated in May, 1977.[2] The defendants have not yet been tried on the pending state charges.

In July, 1980, both defendants moved to disqualify Donald A. Browne, state's attorney of the judicial district of Fairfield, and all members of his staff and office. These motions were denied by the trial court and the defendants

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[1] Seven defendants involved in the federal prosecution ultimately were convicted and two were acquitted. See *United States* v. *Bubar,* 567 F.2d 192 (2d Cir. 1976).

[2] Moeller unsuccessfully challenged these state charges on double jeopardy grounds by appeal to this court; *State* v. *Moeller,* 178 Conn. 67, 420 A.2d 1153, cert. denied, 444 U.S. 950, 100 S. Ct. 423, 62 L. Ed. 2d 320 (1979); and in a federal habeas corpus proceeding. *Moeller* v. *Browne,* 634 F.2d 618 (2d Cir. 1980), cert. denied, 449 U.S. 1112, 101 S. Ct. 922, 66 L. Ed. 2d 841 (1981).

have appealed. At oral argument, however, counsel for both defendants: (1) changed their claim on appeal and now seek only the disqualification of state's attorney Browne; and (2) further limited this claim to only one ground for such disqualification.[3]

Both defendants allege that state's attorney Browne has evidenced a personal interest in the outcome of the prosecution against them. The basis of this alleged personal interest is Browne's status as a defendant in a federal civil rights action brought by Powell.[4] Both defendants conceded at oral argument that the existence of the civil rights action alone would not be sufficient to require Browne's disqualification. The basis of their claim is a statement made in court by Browne in arguing for an early trial of the case which, they contend demonstrated Browne's personal interest.[5]

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[3] All other grounds raised in either the trial court or the defendants' briefs were expressly abandoned at oral argument.

[4] This action, *Powell* v. *McNamara*, No. B80-66, was initiated in the United States District Court for the District of Connecticut in February, 1980.

[5] During the course of a May 5, 1980 hearing to set a trial date, state's attorney Browne, responding to the defendants' request for a later date, stated in relevant part: "Further, I should indicate to your Honor that in my own particular situation I have been sued by one of these defendants and it's been alleged by one of those defendants that I have abused my office and have issued a process against him from malicious purposes and whatnot and, if your Honor please, I'm entitled to some consideration as far as getting this matter resolved as well. I think the disposition of this criminal case is going to have a very heavy bearing on the disposition of the civil case which has been pending against me. I've been sued for a half a million dollars and I think it's a matter, if your Honor please, that I'm entitled to an expeditious disposition of that particular case. I don't want to go on the record and make a personal argument to your Honor, but I think that as far as I'm concerned, this is weightier than the request for a continuance for

The trial court, in denying the defendants' motions, rejected this reasoning.[6]

Before we can reach the merits of the defendants' claim, however, it is necessary for us to consider the threshold question of whether the appeal by each of the defendants is from a final judgment.[7] This court may hear the defendants' appeals only if the order denying their motions to disqualify is a final judgment. See Practice Book § 3000; General Statutes § 52-263.

The finality requirement underlying our appellate review represents a clear and firm policy against piecemeal appeals. *State* v. *Kemp*, 124 Conn. 639, 646-47, 1 A.2d 761,

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vacations and teaching at seminars and things of that nature. I think it's more important for me to get that civil matter resolved than it is to have counsel go and instruct seminars somewhere or take a vacation. I put that to your Honor's consideration."

[6] In his memorandum of decision on the defendants' motions, Judge Eielson concluded: "When read in context, the prosecutor's statements indicate that the [statement quoted in fn. 5, supra] is but one of many arguments raised for expediting the criminal trial. As Browne indicated at the same hearing, the prosecution was equally concerned with the fact that the criminal trial had been pending for five years, with the problem of availability of witnesses, with problems caused by lapses in memory, and the tremendous resources that had been committed to preparation, all legitimate concerns with the administration of justice. The prosecution also noted that the defendant was attempting to use the civil discovery process to obtain what Mr. Browne contended were privileged items in the state's case. At the time of these statements, the prosecution had long since been committed to proceeding with the case, and Mr. Browne had been designated as the state's attorney to handle the prosecution. Thus, the prosecutor's statements do not indicate personal animus against the defendant, but rather legitimate concerns with efficient use of prosecutional resources. See *State* v. *Anonymous*, 36 Conn. Supp. 338, 340 [420 A.2d 910 (1980)]."

[7] The court considers this threshold jurisdictional question upon its own motion. At the request of the court, the parties have filed supplemental briefs on the question of appealability.

(1938); Maltbie, Conn. App. Proc. § 10. "Appeal gives the upper court a power of review, not one of intervention." *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). "Adherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.' *DiBella* [v. *United States*, 369 U.S. 121, 126, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962)]." *Abney* v. *United States*, 431 U.S. 651, 657, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977).

The only Connecticut authority relevant to the finality of the denial of the motion to disqualify holds in effect that such a denial is appealable. In *State* v. *Jones*, 180 Conn. 443, 429 A.2d 936 (1980), this court decided on the merits an interlocutory appeal from the denial of a motion to disqualify the prosecuting authority. Although the opinion in *State* v. *Jones*, supra, was silent on the appealability question, the decision on the merits and the earlier denial of the state's motion to dismiss for lack of final judgment both demonstrate that this court considered the denial of the motion to disqualify to be a final judgment.

At the time of our decision in *State* v. *Jones*, supra, the question of the appealability of the denial of a motion to disqualify, in either the civil or criminal context, was unresolved and in dispute by federal authorities. See, e.g., *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 n.10, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981) (detailing split in federal circuits). Leading cases decided since *State* v. *Jones*, supra, however, have now effectively resolved the question by concluding that the denial of a motion to dis-

qualify is not a final judgment. *Firestone Tire & Rubber Co.* v. *Risjord*, supra, 373-79; *Armstrong* v. *McAlpin*, 625 F.2d 433, 437-41 (2d Cir. 1980), overruling *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 496 F.2d 800 (2d Cir. 1974).[8] In view of this recent change, we have reconsidered our position.

Generally, if the trial court order or action sought to be appealed "terminates a separate and distinct proceeding, or if the rights of the parties are concluded so that further proceedings cannot affect them, then the judgment is final for purposes of appeal. *E. J. Hansen Elevator, Inc.* v. *Stoll*, 167 Conn. 623, 627, 356 A.2d 893 [1975]; *State* v. *Roberson*, 165 Conn. 73, 83, 327 A.2d 556 [1973]." *State* v. *Bell*, 179 Conn. 98, 99, 425 A.2d 574 (1979). Cf. *Cohen* v. *Beneficial Industrial Loan Corporation*, supra. "In a criminal case, the imposition of sentence is the final judgment of the court. *State* v. *Moore*, 158 Conn. 461, 463, 262 A.2d 166 (1969); *State* v. *Smith*, 149 Conn. 487, 489, 181 A.2d 446 (1962)." *State* v. *Grotton*, 180 Conn. 290, 293, 429 A.2d 871 (1980). Presentence orders or actions by the trial court which may be considered final for purposes of appeal occur "where the otherwise interlocutory ruling challenged on appeal cannot, if erroneous, later be remedied by suppression of the evidence or reversal of the conviction after trial." *State* v. *Grotton*, supra, 293.

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[8] *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373-79, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981), and *Armstrong* v. *McAlpin*, 625 F.2d 433, 437-41 (2d Cir. 1980), both deal with disqualification in the context of civil cases, and *Firestone Tire & Rubber Co.* v. *Risjord*, supra, 372 n.8, expressly states that its holding is limited to the finality of the denial of civil disqualification motions. Subsequent federal authority, however, has applied the same reasoning to the denial of disqualification motions in criminal cases. *United States* v. *Caggiano*, 660 F.2d 184, 191 (6th Cir. 1981).

Thus, an order prior to sentencing in a criminal case is immediately appealable only if it involves a claimed right "the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, 435 U.S. 850, 860, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978). We have held, for example, the denial of a claim that the state's prosecution places the defendant in double jeopardy to be immediately appealable. *State* v. *Moeller*, 178 Conn. 67, 420 A.2d 1153, cert. denied, 444 U.S. 950, 100 S. Ct. 423, 62 L. Ed. 320 (1979). See *Abney* v. *United States*, supra. Such a claim involves not just a right not to be twice punished but also, in the appropriate circumstances, the right not even to be tried. *Abney* v. *United States*, supra, 660-61. Other interlocutory orders we have held to be immediately appealable include the claimed right to extend the confidentiality of juvenile proceedings to a criminal proceeding; *State* v. *Anonymous*, 173 Conn. 414, 378 A.2d 528 (1977); the claimed right to be adjudicated as a youthful offender; *State* v. *Bell*, 179 Conn. 98, 425 A.2d 574 (1979); and the claimed right to have nolled charges dismissed on speedy trial grounds. *State* v. *Lloyd*, —— Conn. (43 Conn. L.J., No. 5, pp. 10, 12-13) (1981).[9]

Where an interlocutory order involves the denial of a claimed right which may still be vindicated after trial, such a denial is not immediately appealable. Thus, discovery orders are not immediately appealable; *State* v.

[9] The federal courts also have held immediately appealable denials of motions to dismiss based on the protection afforded members of Congress by the speech and debate clause; *Helstoski* v. *Meanor*, 442 U.S. 500, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979); and on vindictive prosecution. *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir.), cert. denied, 449 U.S. 863, 101 S. Ct. 167, 66 L. Ed. 2d 80 (1980).

Grotton, supra, 293; nor is the claim of a speedy trial violation. *United States* v. *MacDonald*, supra; *State* v. *Lloyd*, supra, 12-13. In the present case, the defendants are not claiming a right not to be tried, nor any other right which would be irreparably lost if the trial were to be held.[10] The defendants are claiming, at most, that they should not be prosecuted by state's attorney Browne. Even if it is assumed that the trial court's denial of the motions to disqualify was erroneous, any harm caused thereby would clearly be reparable if convictions are obtained.

"Should the present appeals be sustained they would serve as precedents which might go forth to nullify the purpose of the Legislature in authorizing an appeal only from a 'final judgment.' . . . To permit appeals from rulings upon such motions might seriously delay the final disposition of pending cases. On the one hand, counsel who sincerely felt that by an order upon such a motion the rights of his client were seriously harmed might feel compelled to take an immediate appeal; and, on the other hand, the opportunity to appeal in such a situation might well serve the purpose of parties who desire for their own ends to postpone the final determination of the issues. Allowance of multiple appeals in a single action would not accord with the sound policy which favors the speedy disposition of actions in court, and particularly of criminal prosecutions." *State* v. *Kemp*, supra, 246-47.

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[10] The defendants' claim to the contrary because "one cannot say that the presence of a totally unbiased, non-conflicted prosecutor would not result in nolles, dismissals or other acceptable dispositions short of trial" is highly speculative and, consequently, does not amount to a right which would be lost if not vindicated before trial.

We conclude that the order denying the defendants' motions to disqualify is not a final judgment and may not be immediately appealed. To the extent *State* v. *Jones*, 180 Conn. 443, 429 A.2d 936 (1980), is inconsistent with this conclusion, it is overruled.

The appeals are hereby dismissed sua sponte.

In this opinion Parskey, Shea and Covello, J.J., concurred.

PETERS, J. (concurring). Because I view with the utmost seriousness the questions raised by the statement of the state's attorney, I want to emphasize that our procedural resolution of these cases in no way signals a retreat from the substantive standards of *State* v. *Jones*, 180 Conn. 443, 429 A.2d 936 (1980). The state's attorney's responsibility is not limited to *avoidance* of a possible conflict of interest. As an officer of the court and of the state, he is, I believe, in addition, charged with the duty of avoiding the *appearance* of a conflict of interest. Code of Professional Responsibility, Canon 9.

Appendix B

Trial Court's Memorandum of Decision, Denying Motions to Disqualify

No. 25,131

SUPERIOR COURT

STATE OF CONNECTICUT

VS.

CHARLES MOELLER

No. 25,130

STATE OF CONNECTICUT

VS.

LOWELL POWELL

JUDICIAL DISTRICT OF FAIRFIELD AT BRIDGEPORT

October 29, 1980

MEMORANDUM OF DECISION

On March 1, 1975, the Sponge Rubber Products Company in Shelton, Connecticut, was destroyed by fire, which investigators designated to be caused by arson. Defendant Moeller was charged by the State on May 3, 1977 with conspiracy to commit arson. Defendant Powell was arrested on May 10, 1977 and similarly charged.[1]

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[1] Prior to this state action, ten individuals were indicted and arrested in a federal prosecution. Defendant Moeller was acquitted in the federal trial. Defendant Powell was not one of those against whom federal charges were brought.

Appendix B—Trial Court's Memorandum of Decision, Denying Motions to Disqualify

On February 22, 1980, defendant Powell brought a civil action in federal court against State's Attorney Donald Browne. The suit alleged violations of Powell's civil rights under 42 U.S.C. § 1983 arising out of his arrest and prosecution in the arson case. The suit seeks $500,000 in monetary damages.

Defendants now move to disqualify the State's attorney and his entire staff on the grounds that Browne's dual status as prosecutor here and defendant in the civil action creates a conflict of interest which might interfere with the prosecutor's duty of impartiality and fairness. For the reasons hereinafter set forth, the motion is denied.

The question before the court is whether a state's attorney and his staff are disqualified from continuing a prosecution because the state's attorney has been sued by one of the defendants in a civil rights action prior to the start of the criminal trial.

Neither of the parties has cited nor has the court's own research revealed any authority directly on point from Connecticut or any other jurisdiction. Cases dealing with disqualification of prosecutors are legion, and many of these have been amply briefed. Most of this authority, however, has dealt with factual settings which provide little guidance in deciding this motion.

Much of the authority deals with the prosecutor who is called upon to prosecute an individual whom he or an associate previously represented, thus presenting the danger of breaching a confidential relationship. See generally Annot., 31 A.L.R. 3d 953 (1970). No such claim is made in the instant case.

Another commonly encountered situation has arisen where the prosecuting attorney also represents or bears

some other close relationship to the victim of the crime being prosecuted. See e.g., *Ganger* v. *Peyton*, 379 F.2d 709 (4th Cir. 1967); *People* v. *Superior Court of Contra Costa County*, 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977); *People* v. *Jimenez*, 187 Colo. 97, 528 P.2d 913 (1974); *State* v. *Thomason*, 353 So.2d 235 (La. 1977); *State* v. *Monk*, 315 So.2d 727 (La. 1975); *Sinclair* v. *State*, 278 Md. 243, 363 A.2d 468 (1976); *Commonwealth* v. *Tabor*, 384 N.E.2d 190 (Mass. 1978); *Garton* v. *State*, 454 S.W.2d 522 (Mo. 1970); *People* v. *Krstovich*, 72 Misc. 2d 90, 338 N.Y.S. 2d 132 (1972); see also *Hall* v. *State*, 44 Ala. App. 406, 210 So.2d 852 (1968); *People* v. *Battin*, 73 Cal. App. 3d 635, —— P.2d ——, —— Cal. Rptr. —— (1978); *State* v. *Melerine*, 236 La. 881, 109 So.2d 454 (1959); *State* v. *Bosworth*, 124 Vt. 3, 197 A.2d 477 (1963); *Commonwealth* v. *Dunlap*, 233 Pa. Super. 38, 335 A.2d 364 (Super. Ct. 1975); aff'd by an evenly divided court, 474 Pa. 155, 377 A.2d 975 (1977). Results in all of these cases have varied depending upon the precise facts. Although these cases are perhaps closer in terms of the ethical issues raised, these cases, too, differ from the instant one in that the defendant is not presented with the opportunity to manipulate the prosecutor's handling of the case by the mere expediency of bringing a lawsuit.

What emerges from the authority is that the decision to disqualify rests in the discretion of the trial court, guided by the facts and circumstances with which it is presented and the ethical duties imposed upon the bar generally, see Code of Professional Responsibility,[3] Practice Book 1-52 (1978), Canon 5, Ethical Consideration 5-1, 5-2, Disciplin-

[3] The ABA Code has been adopted by the judges of the Superior Court. *State* v. *Jones*, 41 Conn. L.J., No. 45, 5 (May 6, 1980).

ary Rule 5-10(A); Canon 9; and on the prosecution specifically, see id., Ethical Consideration 7-13; 8-8; American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, The Prosecution Function § 1.2 (Approved Draft 1971).

In denying this motion, the court is influenced by three factors. First, in *State* v. *Tyler*, 587 S.W.2d 918 (Mo. 1979), the Supreme Court of Missouri was faced with a very similar factual situation. In that case the defendant sought to disqualify the prosecution on the grounds of bias and prejudice arising out of the defendant's civil rights action against the prosecutor. In upholding the trial court's denial of the motion, the Supreme Court stated:

> "It was not shown that any of the litigation initiated by the defendant would be affected by the outcome of the instant case. While it is generally true that the prosecutor's personal animus against a defendant disqualifies him from prosecuting . . . there is no such hostility shown on the part of the prosecutor Harper. In the case now before us the defendant could paralyze the prosecution if he could secure the disqualification of prosecutors and other law enforcement officials by the simple expedient of filing of lawsuit against them."

Id. at 930.[3] Cf. *State* v. *Lucas*, 123 Ariz. 39, 597 P.2d 192 (1979) (county attorney's office not disqualified from the prosecution by its representation of the County Board of Supervisors in civil rights action filed by defendant against

[3] To a degree, the facts of *Tyler* are distinguishable from the present case, but the policy considerations expressed nevertheless remain a legitimate consideration.

Supervisors); *Martin* v. *Leverette*, 244 S.E.2d 39 (W. Va. 1978) motion to disqualify prosecutor from resentencing proceeding because of civil rights action filed against prosecutor was properly denied since resentencing was determined by statute).

Second, the court is greatly influenced by the timing of the lawsuit. The incident giving rise to this prosecution occurred in March of 1975. The federal prosecution was completed in January of 1976. The state prosecution commenced in May of 1977. The civil suit was not commenced until February of 1980, merely four days, according to the parties, before the statute of limitations expired on the § 1983 cause of action, yet nearly two years after the state prosecution commenced. The lawsuit deals with the activities of the prosecutor in compiling the affidavits used to procure the arrests in this case in May, 1977. Thus, the suit is premised upon information within the defendants' knowledge when the warrants were issued nearly three years ago. The defendants do not contend otherwise.

Third, the defendants place much weight on a single statement of the prosecutor made at a May 5, 1980 hearing to determine a trial date, which the defendants contend shows Mr. Browne's bias. Mr. Browne stated:

> "Further, I should indicate to your Honor that in my own particular situation I have been sued by one of these defendants and it's been alleged by one of those defendants that I have abused my office and have issued a process against him from malicious purposes and whatnot and, if your Honor please, I'm entitled to some consideration as far as getting this matter resolved as well. I think the disposition of this criminal case is going to have a very heavy bear-

ing on the disposition of the civil case which has been pending against me. I've been sued for a half a million dollars and I think it's a matter, if your Honor please, that I'm entitled to an expeditious disposition of that particular case. I don't want to go on the record and make a personal argument to your Honor, but I think that as far as I'm concerned, this is weightier than the request for a continuance for vacations and teaching at seminars and things of that nature. I think it's more important for me to get that civil matter resolved than it is to have counsel go and instruct seminars somewhere or take a vacation. I put that to your Honor's consideration."

When I read in context, the prosecutor's statements indicate that the above is but one of many arguments raised for expediting the criminal trial. As Browne indicated at the same hearing, the prosecution was equally concerned with the fact that the criminal trial had been pending for five years, with the problem of availability of witnesses, with problems caused by lapses in memory, and the tremendous resources that had been committed to preparation, all legitimate concerns with the administration of justice. The prosecution also noted that the defendant was attempting to use the civil discovery process to obtain what Mr. Browne contended were privileged items in the state's case. At the time of these statements, the prosecution had long since been committed to proceeding with the case, and Mr. Browne had been designated as the state's attorney to handle the prosecution. Thus, the prosecutor's statements do not indicate personal animus against the defendant, but rather legitimate concerns with efficient use of prosecutional resources. See *State* v. *Anony-*

mous, 36 Conn. Supp. 338, 340, 42 Conn. L. J. 16, 2 (October 14, 1980).

All of the foregoing applies equally to defendants Powell and Moeller, both of whom pursue this motion. With respect to defendant Moeller however a final and more obvious reason exists for denying this motion. Moeller is not a party to the civil action and thus no real or apparent conflict has been created thereby.

The motion is denied.

Eielson, J.

Filed October 30, 1980.

Appendix C

Bench Warrant Affidavit

STATE OF CONNECTICUT)
) ss Fairfield, May 19, 1977
COUNTY OF)

Then and there by virtue of the annexed warrant I arrested the body of the above-named accused, read said warrant in his hearing—or acquainted him with the substance thereof—and have presented him before proper authority.

Sgt. N. Valerio
State Policeman

STATE OF CONNECTICUT
COUNTY OF FAIRFIELD ss Fairfield, May 3, 1977

AFFIDAVIT OF SERGEANT NICHOLAS VALERIO

That the affiant is a regular member of the Connecticut State Police Department and has been for the past seventeen years. At the present time he is assigned to the Detective Division and in that capacity has actively participated in the investigation of an explosion and fire which occurred on the evening of March 1, 1975 at a location known as the Sponge Rubber Products Company in Shelton, Connecticut and has continually read and reviewed official reports of both the Connecticut State Police Department and Federal Bureau of Investigation concerning the cause and identity of individuals believed to have been involved in that incident.

That the aforementioned investigation by the Connecticut State Police and the Federal Bureau of Investigation has

established that on March 1, 1975, the Sponge Rubber Products Company, Canal Street, Shelton, Connecticut, a division of Grand Sheet Metal, Inc., Spencerville, Ohio, was engulfed by flames after an explosion and fire. Said explosion and fire began at approximately 11:30 P.M. and burned into the early morning hours of March 2, 1975, completely destroying the Plant #4 portion of said company. That said explosion and fire was reported to the affiant and other investigators by State Police Fire Investigator Sergeant Frederick Moffett and other witnesses who heard the aforementioned explosion. That during the normal course of this investigation, members of the Connecticut State Police Department have reported to said affiant regarding information received in said investigation and have reported the information contained herein and the affiant has also personally consulted with and reviewed reports of members of the Federal Bureau of Investigation concerning such incidents.

That on March 1, 1975, prior to the fire, at approximately 10:00 P.M., two security guards and a boilerman, the only three employees at Plant #4 of the Sponge Rubber Products Company, at that time, were kidnapped at gunpoint by three men wearing over-the-head ski masks. Handcuffs were placed on their wrists and their eyes were taped. They were led from the building at approximately 10:45 P.M., after having been held at said plant in the bound condition for approximately 45 minutes, placed in the rear seat of one of the guard's vehicles and driven to the Town of Monroe, Connecticut. The victims were left in the car after the perpetrators removed the handcuffs from their wrists and bound them with adhesive tape. The above information was obtained from the three victims on March 2, 1975.

Appendix C—Bench Warrant Affidavit

That on March 6, 1975, Sergeant Frederick Moffett, of the State Police Public Safety Division, was interviewed by Sergeant Robert Geoghan of the Connecticut State Police Department at Plant #4. Sergeant Moffett pointed out an indentation burned into the concrete of the first floor, leading past the entrance to the ladies room and to a point in the press room where there was a crater in the floor caused by an explosion. Sergeant Moffett stated that the burned indentation was caused in his opinion, by detonating cord, used as an accelerant to detonate explosives. Sergeant Moffett further stated that he determined this by an alligator pattern left as the trail of the indentation across a piece of steel.

That on March 7, 1975, Sergeant Robert O'Shaughnessy of the Connecticut State Police Emergency Services Division, reported that after clearing debris at the burned out plant he found a trail left by the detonating cord indicating that at least 5000 feet of detonating cord was used. Sergeant O'Shaughnessy further stated that the remains of four paper fiber drums were found in the debris and said drums had plastic linings inside. That a strong odor of gasoline or paint thinner was detected at said fiber drums. That the drums bore the markings of the Kodak Film Company indicating that they did not belong in the plant. That the fiber drum remains were examined at the FBI Laboratory in Washington, D.C., where gasoline traces were found in the plastic lining remains of said drums.

During the course of this investigation it was learned that a person by the name of David Nobel Bubar, of New York City and Memphis, Tenn., was a personal friend of Charles Moeller, President of the Sponge Rubber Products Company and the parent Grand Sheet Metal, Inc. Also at

one time David Bubar served on the board of directors for the Grand Sheet Metal, Inc.

That during the latter part of October, 1976, and the middle of November, 1976, interviews were conducted of David Bubar by the affiant and members of the Federal Bureau of Investigation. All of the following information pertaining to what was said by David Bubar was obtained from him during the above times.

Bubar stated during these interviews that during the month of December, 1974, he was contacted by Charles Moeller of Spencerville, Ohio, whom he had not spoken to in several months. Bubar stated that several conversations took place at the Sponge Rubber Plant in Shelton, Connecticut, during this month and the month of January, 1975, between he, Charles Moeller, and Lowell Powell, of Lima, Ohio, who is Secretary-Treasurer of Ohio Decorative Products, parent company of Grand Sheet Metal Company, Sponge Rubber Division. As a result of these conversations, Bubar learned that Sponge Rubber was in financial difficulty and that Moeller wanted the plant destroyed by an explosion and wanted to know if Bubar knew anyone who could do it. Bubar stated to Moeller that he didn't know anyone personally but might be able to find someone for him.

Bubar stated that as a result of this request by Moeller, to have someone destroy the plant, he contacted an individual named Michael Festa, a friend for many years, who resided at that time in Hudson, Ohio. Bubar said that he told Festa that Charles Moeller, whom Festa knew, was in financial difficulty and asked if Festa knew anyone who could destroy the plant to which Festa said he might be able to help him after checking on it. After numerous conversations with Festa in regard to the matter, Festa told

him (Bubar) that he believed he had someone who could help him but it would cost some money.

Bubar said that he was subsequently contacted by Michael Festa who told him that he made arrangements for Bubar to meet some people at the Pittsburgh Airport on February 2, 1975. Bubar stated he recalls contacting Charles Moeller and Lowell Powell during the last week of January, 1975, and telling both men that he needed $10,000. to get the plant destroyed. Powell indicated that they did not have the money in Shelton and that he didn't know where he was going to get it. Bubar stated that further conversation was had with Lowell Powell and Charles Moeller about the money needed to finance the destruction of the plant and it was finally agreed that Powell and Moeller would secure the funds and Moeller stated that they did not have the money in Shelton and he would have to go out of town to get it. Bubar advised Charles Moeller that he needed the money prior to February 2, 1975 because of his arrangement to meet some people in Pittsburgh on that date in connection with the matter.

That on June 9, 1975, Lowell Powell made available to members of the FBI, checks for account #097162 drawn on the Exchange National Bank of Chicago, Chicago, Illinois. This account was specifically the business account for Ohio Decorative Products, Inc., 220 South Elizabeth Street, Spencerville, Ohio. A review of these checks disclosed that check #5926, dated January 30, 1975, payable to Metropolitan Bank for the amount of $10,000. and signed by Lowell Powell as maker. This check was endorsed Ohio Decorative Products, name illegible, Metropolitan Bank of Lima, Ohio. An investigation at the Lima Bank indicated that the above mentioned check was cashed at the bank on January 30, 1975 by Charles Moeller.

Appendix C—Bench Warrant Affidavit

Bubar stated that on January 30, 1975, he was in contact with Charles Moeller by phone and Moeller advised that he had ten green pillows which would be delivered to him at the McAlpine Hotel in New York, where Bubar was residing, the following day by Lowell Powell. Bubar indicated that the term "green pillows" was agreed upon by the same parties as the code for the words money or dollars. Bubar further stated that sometime in January, 1975, after it was agreed upon to destroy the plant, he recalled a conversation that he had with Charles Moeller at which time Lowell Powell was present and it was agreed that in connection with their planning to destroy the plant they would use as a subterfuge the water treatment process, of which Bubar had spoken to Moeller prior to that date. It was further agreed that in order to make the necessary payments to people to destroy the plant, they would use company checks payable to Southern Supply, Bubar's Company, and allege that the checks were for the water treatment process. Bubar said that the Southern Supply Company was his personal company and did not do any work for any of Charles Moeller's companies and that Southern Supply never before had received any checks from any of Moeller's companies. Bubar stated the following cash payment from Charles Moeller was the only cash payment made with the other payments being made by check.

Bubar said that on January 31, 1975, while at the McAlpine Hotel, Lowell Powell arrived at his apartment with some pillows and he and Powell went into his bedroom where Powell removed a shoe box from among the pillows and handed it to Bubar. Bubar stated that the box contained $10,000. cash money. Bubar said that a friend of his named Cayse Wilson was present in his apartment

when Lowell Powell appeared with the pillows. Bubar said that he placed the money in his safe deposit box, #27, at the McAlpine.

On March 10, 1975, members of the FBI interviewed Cayse Wilson at his office in Atlanta, Georgia, and he stated that he was in David Bubar's apartment in the latter part of January and the early part of February, 1975, and that during that time an unidentified male came to the apartment with some pillows and this man and Bubar went into the bedroom where they remained until he, Wilson, left.

William Povalaitis, of Derby, Connecticut, a driver for Sponge Rubber Products, stated that he recalls bringing Lowell Powell to the McAlpine Hotel from the plant in Shelton sometime during the early part of 1975. Povalaitis said that several pillows were taken from the plant with them to the McAlpine Hotel where they were left. He said that after bringing Powell and the pillows to the McAlpine Hotel, he brought Powell to Tweed New Haven Airport.

That a check of the flight records of John Gardner, 135 Sereff Drive, Lima, Ohio, pilot for Ohio Decorative Products, revealed that on January 31, 1975, he flew from Allen County, Ohio, to New Haven, Connecticut, and returned to Allen County with a passenger, Lowell Powell.

Bubar said that after the delivery of the $10,000. on January 31, 1975, he telephoned Michael Festa and made arrangements to meet Festa at the Pittsburgh Airport about 6:00 P.M. on February 2, 1975. Bubar said he flew to Pittsburgh, Penn. on February 2, 1975, where he met Michael Festa, a person identified as Jack Mazza and another person who was later identified as Jack Mazza's brother. Bubar said that he removed $5,000. cash from his safety deposit box before he left New York and took it

with him to Pittsburgh. Bubar said that while at the Pittsburgh Airport he, Festa, and the two Mazzas went into a restaurant and while there he and Festa went into a mens room and he gave Festa two envelopes each with $2,500. in it. He said that he suggested to Festa that he hold onto one of the envelopes and give the other to the person he had to deliver it to. Bubar said that he later saw Festa give one of the envelopes to Jack Mazza. Just prior to leaving the restaurant Jack Mazza told Bubar that someone would be in touch with him in New York.

Flight verifications by members of the FBI showed that David Bubar took a flight from New York, via Allegheny Airlines, on February 2, 1975, to Pittsburgh, Penn., and returned to New York on the same date.

Bubar said that subsequent to this meeting in Pittsburgh, he contacted Charles Moeller and told him what had transpired between himself, the Mazzas and Festa. Bubar said that during the conversation with Moeller, Moeller said that the plant had to be destroyed as soon as possible as he was in bad financial condition.

Bubar said that during the latter part of the week of February 2nd to 8th, he received a phone call from a man who identified himself as Mike Jamison. Jamison indicated that he would be coming to New York in the afternoon and that Bubar should meet him at the airport. Jamison gave a description of himself to Bubar and Bubar did the same to Jamison. Bubar said that he made arrangements for the company driver to pick he and Jamison up at the airport. Bubar said that he did meet Jamison, whom he later identified as Peter Betres (who resided in Butler, Penn.), and they were brought to the Shelton Plant of Sponge Rubber in a company car driven by a company employee. Bubar said that the reason for the trip was for Betres to

look over the plant. Bubar said that while at the plant he told Betres that the owner wanted to make sure the smoke stack and power plant were left undamaged and all he wanted was one building destroyed. Bubar said that the owner didn't want anyone hurt in the destruction of the plant. Bubar said that he and Betres were then brought to New York where he was taken to the McAlpine Hotel and he told the company driver to take Betres wherever he wanted to go.

William Povalaitis said that he did pick up Bubar and another person at Allegheny Terminal at LaGuardia Airport in New York on one occasion and he fixed the time as about 3:30 P.M. He said that he drove the two men from the airport to the Sponge Rubber Plant arriving there at about 5:00 P.M. and both Bubar and the other person went into the factory and stayed there for two and one half to three hours. Povalaitis said he then drove Bubar and this other man to New York and left Bubar at the McAlpine Hotel, and then was instructed to take the other unidentified person to wherever he wanted to go. Povalaitis said that this person wanted to be taken to Long Island via the Long Island Expressway. Povalaitis said that while on the Expressway he was instructed to stop at a pay phone where the passenger made a brief phone call and then instructed Povalaitis to take him to Exit 50. Povalaitis said that he complied and dropped this person off at a gas station and returned alone to Connecticut. Povalaitis later identified this unknown person as Peter Betres.

Bubar said that while at the plant with Betres as related above, Betres told him that the plant was big and he would need $20,000. to do the job. Bubar stated that after the visit by Betres to the plant he called Moeller and

told him that the man wanted $20,000. Moeller told him that it would be tough to get the money but he would get a check and deliver it to him on February 10, 1975. Bubar also said that on February 10, 1975, a Monday, he went to LaGuardia Airport sometime in the morning and met Charles Moeller and recalled Moeller giving him an Ohio Decorative check in the amount of $20,000. payable to Southern Supply. Bubar stated that he deposited the check into the Southern Supply account and withdrew $10,000. by writing out a check for this amount.

A review of account #097162 of Ohio Decorative Products revealed that check number 6031, dated February 10, 1975, was made payable to Southern Supply for the amount of $20,000. This check was deposited to account #007-047029, The Chemical Bank, New York Trust Company, New York. A review of this bank statement for Southern Supply by members of the Federal Bureau of Investigation revealed that on February 10, 1975 a deposit of $20,000. was made. It further indicates that on February 11, 1975 check number 201 was written out "Cash David Bubar" and endorsed David Bubar. This check was for the amount of $10,000.

Bubar further reported that on February 11, 1975 he was with Peter Betres at an airport in New York and while at the airport they ate at a restaurant and he went into the mens room with Betres and at that time he gave Betres $10,000. cash and Betres said that he needed more money. Bubar said that he then wrote out two $3,000. checks and gave them to Betres. The checks were drawn on Southern Supply with payee left blank on request of Betres.

A further review of the Southern Supply account revealed check number 200 for the amount of $3,000. from David N. Bubar to Peter Betres. This check was endorsed

by Peter Betres and a stamp showed it was cleared by the Chemical Bank on February 12, 1975. The records also show that check number 201 in the amount of $3,000. written by David Bubar to Peter Betres and was endorsed by Peter Betres. A stamp on the check showed that it was cleared by the Chemical Bank on February 14, 1975.

Bubar further stated to investigating officials that after the visit to the plant by Betres other visits were made to the Sponge Rubber Plant by people other than Betres who were involved in the destruction. These took place during the month of February, 1975.

Bubar said that on Friday, February 28, 1975, he went to the Sponge Rubber Plant in Shelton with Peter Betres. Bubar said he initially left Betres at a Howard Johnson Restaurant in Derby, Connecticut, and went to the plant with Lowell Powell, where he received a check for $15,000. which was to be used for a payment for the destruction of the plant. Bubar further stated that on the 28th while at the plant he called Charles Moeller at Horse Cave, Kentucky and informed him that the plant was going to be destroyed the following day. Bubar said that he also told Moeller that he had given the man up to that time a total of $30,000. and that the man wanted an additional $30,000. Moeller told Bubar that he didn't have $30,000. but would give him $15,000. that date and to tell the man he would give an additional $15,000. after the plant was destroyed. After this conversation with Bubar, Moeller asked to speak to Lowell Powell and Bubar said that Powell got on the phone. Bubar said that Powell was present during the entire conversation he had with Moeller. Bubar said that after Powell finished talking to Moeller he and Bubar went into another office where Powell told him that he would write out a check for $15,000. but would need an invoice and it was agreed that Bubar would type

an invoice for $15,000. and list the purpose for the payment as "Water Treatment". Bubar said that he went to the office of Jeanette Kordiak and typed out an invoice for $15,000. and gave it to Lowell Powell who in turn gave him a check for $15,000. drawn on the Sponge Rubber Company made payable to Southern Supply.

Jeanette Kordiak, Moeller's Secretary, stated that on Friday, February 28, 1975 she saw Bubar and Powell at the plant at 1:00 P.M. at which time they entered Moeller's office and closed the door. She said that in about fifteen to thirty minutes Bubar came out of the office and wanted to use her typewriter. She said that she offered to type what he wanted and he replied that he knew what he wanted and it would be simpler if he did it himself. She said that she stepped aside and let Bubar use the typewriter and Powell came out of the office and stood behind Bubar. Mrs. Kordiak said that when Bubar finished typing he took the paper out of the typewriter and he and Powell went back into Moeller's office and closed the door.

John Fiore, of Oxford, Connecticut, Comptroller for Sponge Rubber stated that on February 28, 1975 he was in Howard Johnson's Restaurant in Derby with Lowell Powell and Don Jerwers, another employee of the company. He said that while there Lowell Powell invited a man to join them and introduced this man to them as David Bubar who was working on the water purification project at the plant. Fiore said that he left Bubar and Powell behind when he returned to his office at Sponge Rubber. Fiore said that one of his duties at Sponge Rubber is to issue checks for the company and that no checks are issued without the accounting department first being in receipt of a purchase order, customer invoice and a receiving department record of what items came into the com-

pany. Fiore stated that this policy applied to everyone with the possible exception of the corporate officers. He said that on February 28, 1975 he granted an exception to this policy to Lowell Powell sometime in the afternoon after eating at Howard Johnson. Fiore said that Lowell Powell requested a $15,000. check payable to Southern Supply Company. Fiore said that at the time of the request Powell furnished him with some papers and he told Fiore that the check was to pay for work on the water purification system. Fiore said that the check was issued.

Bubar said that he went to New York during the afternoon of February 28, 1975, and cashed the check, then returned to Connecticut where he picked up Betres near the Howard Johnson Restaurant in Derby and they went to the Sponge Rubber Plant.

Bubar stated that on Saturday, March 1, 1975, he brought three men into the Sponge Rubber Plant who were to set the explosives within the plant. Bubar said that he also brought the three men who were to kidnap the guards into the plant during Saturday evening. Bubar said that after a meeting within the plant of the kidnappers and the explosives men, he left Shelton and went to New York.

Bubar said that he drove the company car to LaGuardia Airport in New York where he made a phone call to the residence of Michael Festa and learned he was not at home.

Bubar stated that during the course of the arrangements to have the plant destroyed at Shelton, Connecticut, he made numerous phone calls to Peter Betres, Mike Festa and others, and charged these calls to the Custom Beverage account in Ohio.

John Shaw of Harrisburg, Pennsylvania, in a confession to members of the Federal Bureau of Investigation, and the Connecticut State Police Department, stated that he par-

ticipated in the explosion of the Sponge Rubber Plant on March 1, 1975, and in preparation of this explosion he, Michael Tiche and Dennis Tiche prepared gasoline and dynamite at the Gatti Chemical Company in Boyers, Penn., which is owned by Dennis Tiche. Shaw said that the material was placed into a rented truck and during the early morning hours of February 28, 1975, the truck was turned over to "Blackie" Connors. Shaw said that he and the two Tiches then flew to New York and then took a train to New Haven and stayed there for the night of February 28, March 1, 1975. Shaw said that on Saturday morning, March 1st, he and the two Tiches went to the Howard Johnson's Restaurant in Derby, Connecticut, where a meeting was held with a man named David Bubar and three other men who were to kidnap the guards from the plant. Shaw said that he and the Tiches were then brought to the plant by Bubar and were brought inside as men taking a telephone survey. Shaw also said that because of the inventory being conducted within the plant they were unable to place the dynamite and gasoline throughout the plant, which had been brought there in the truck they gave to "Blackie". Shaw said that during the evening, after the workers left, the dynamite and gasoline was placed throughout the plant, he also said the three men who were to kidnap the guards were brought inside the plant and while he and the Tiches concluded their business the other three men took the guards into custody. Shaw said that after completing their work within the plant, he and the Tiches left the plant and joined the other men at a place where the kidnapped guards were left. Shaw said that after leaving the guards, they checked to determine if the explosion had occurred, which it had, and they continued on to Pennsylvania.

Appendix C—Bench Warrant Affidavit

On March 12, 1975, Michael R. Festa of Hudson, Ohio, who is president of Custom Beverage, was interviewed by members of the FBI and at that time he admitted that he met Charles Moeller through David Bubar and he met with Moeller in order to interest him in investing a sum of money into Custom Beverage.

Festa said on March 2, 1975, he was at his other apartment in New York and at about 3:00 P.M. David Bubar appeared at the apartment. Festa said that Bubar stayed there for about three hours. Festa said that Bubar made only a passing comment regarding an explosion and fire which took place the night before at the Sponge Rubber Plant. Festa said that Bubar made no mention of the fact that he had been at Sponge Rubber on March 1, 1975, and made no mention of the fact that he was conducting a water treatment survey.

On December 15, 1975, Michael Festa testified under oath in Federal District Court, New Haven, Connecticut, during the trial of several people accused of Federal Violations in this same bombing of the Sponge Rubber Plant. Mr. Festa on that date was asked "Did you, during the month of February of 1975, have occasion to go to Pittsburgh?" to which Festa answered, "No." He was then asked, "You're certain?" to which he replied, "I might have. What date did you say?" to which he was told, "During the month of February of 1975." Festa then answered, "I am not sure." He was then asked, "You're not sure you went, and you're not sure you didn't go?" to which Festa answered, "That is right."

Festa was later asked, "Do you recall calling Reverend Bubar on February 1, 1975, from your home to the Emergency Spiritualism Society at New York City, which is at the McAlpine Hotel?" Festa replied: "It's quite possible.

I am not sure." He was further asked, "Do you recall arranging with him to meet him in Pittsburgh on February 2, 1975?" Festa answered, "No way."

That on March 16, 1977 Michael Festa was again interviewed by agents of the Federal Bureau of Investigation in Sarasota, Florida and at that time Michael Festa did admit that he had in fact met with David Bubar at the Pittsburgh Airport on February 2, 1975 and that he had in fact received the sum of $2,000 cash money from David Bubar on that occasion, but that that payment was actually a partial payment on a pre-existing $14,000 debt owed to him by David Bubar. Festa further admitted that John Mazza and Frank Mazza were present at the Pittsburgh Airport at said time.

That an examination of long distance telephone call toll charges charged to the account of Michael Festa personally or his telephone credit card or his business known as Custom Beverage reflect long distance toll calls to the residence of David Bubar in New York, on January 30, 1975, January 31, 1975, February 8, 1975; February 20, 1975 and February 25, 1975.

Further, an examination of the long distance telephone call toll charges charged to the account of Michael Festa or his credit card or his business reflect long distance toll calls to the telephone number of John Mazza in Pittsburgh on February 1, 1975, February 2, 1975 and February 3, 1975.

SERGEANT NICHOLAS VALERIO

Subscribed and sworn to before me this 3rd day of May, 1977.

.....

Notary Public

Appendix D

Excerpt of Transcript, May 5, 1980

SUPERIOR COURT

FAIRFIELD COUNTY AT BRIDGEPORT

May 5, 1980

No. 25, 131

STATE OF CONNECTICUT

vs.

CHARLES MOELLER

No. 25, 130

STATE OF CONNECTICUT

vs.

LOWELL POWELL

No. 25, 129

STATE OF CONNECTICUT

vs.

MICHAEL FESTA

Before: HONORABLE ROBERT J. CALLAHAN,
Judge

Appendix D—Excerpt of Transcript, May 5, 1980

APPEARANCES:

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Chief State's Attorney
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For the Defendant Moeller:

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By: Theodore I. Koskoff, Esq.

For the Defendant Festa:

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By: Jacob D. Zeldes, Esq.
Roberta Olson
Court Reporter

Mr. Browne: If your Honor please, assigned for a hearing this morning is a motion for a continuance in the matter of docket number 25,131 entitled Charles Moeller.

I should indicate to your Honor I was handed this morning by Attorney Zeldes a motion in a similar matter that's 25,129, Michael Festa. It is a motion entitled Motion By Defendant Festa For Continuance and Mr. Zeldes is here this morning.

I should also indicate to your Honor that it's been called to my attention that in my mail, my personal mail delivered to my office this morning, I received a motion in a com-

panion matter of docket number 25,130, State of Connecticut vs. Lowell Powell. This is entitled Defendant's Motion For Continuance. This has been signed by John A. Burgess, Esquire, of the State of Vermont who has been granted permission to represent Mr. Powell in this matter.

It occurs to me initially that these matters probably should all be heard at the same time. Mr. Burgess has now filed this motion on behalf of Mr. Powell. Mr. Burgess is, obviously, not here this morning, so that I think that whatever, I assume we ought to get this down some day where Mr. Burgess can come in and argue his motion as well.

Mr. Koskoff: I talked to Mr. Burgess this morning. He is on trial in Vermont. He said to me that he would stand on the papers submitted. I believe your Honor has a copy of it. It's a motion to which he says he couldn't add anything to the motion.

The Court: Well, what papers has he submitted?

Mr. Koskoff: The same kind of motion. Do you have a copy in your file?

The Court: What's that you have there?

Mr. Browne: I have a copy of a motion entitled The Defendant's Motion For A Continuance, the original of which I am working on the assumption that was filed by the clerk.

The Clerk: Yes.

The Court: You indicate to me, Mr. Koskoff, that you've talked to Mr. Burgess and that he will stand on his motion dated April 30th wherein he asks for a date of August 1st; is that right?

Mr. Koskoff: Yes, your Honor.

The Court: All right.

Mr. Koskoff: We also have filed similar motions, all three codefendants.

Appendix D—Excerpt of Transcript, May 5, 1980

The Court: All right. I will proceed with the motion today on the representation by Mr. Koskoff as an officer of the court. It has been scheduled for June 17th. I ask you gentlemen, what do you have in mind?

Mr. Koskoff: Your Honor, our motion and Mr. Burgess's motion calls for August 4th for the reasons stated in both his motion and mine.

The Court: Mr. Zeldes, it would be too much to expect that you would ask for August 4th, too; right?

Mr. Zeldes: Yes, your Honor, and if I may just give a little bit of a history of the background, I'll try to explain why I think that's inappropriate.

Apparently, there are three defendants charged with conspiracy in this matter. The State has never made a motion to consolidate the cases to my knowledge. At a time when I was not present, as our papers say, there were discussions with Mr. Burgess and Mr. Koskoff and Mr. Browne and I gather, your Honor, the June 17th ruling was made which people seem to assume also applied to the Festa case, although we had no knowledge. I'm not absolutely certain if the same type of amendments to the information were filed in that case at the same time they were in ours, but at any rate, it was not until March 19th that the State filed their amended information. We will file very shortly our motions directed to the amended information in compliance with the discovery.

As for the reasons I object to the August 4th date, your Honor, I've set those out in the moving papers and I think I should perhaps also say that August is generally the date that is associated with summer plans and things and courts are usually working at a less than full head of steam during that period of time. It seems to me that after Labor Day when we get back into the regular business of the courts, it

would be more appropriate to have the case scheduled at that time. I don't know what Mr. Browne's reasons are. He did indicate to me the other day he was going to present them on the record today for thinking that the June 17th date or even the August date is a significant time to start, but it just seems to me from everything that I have recounted including everything that's in our moving papers, that September 2nd, the day after Labor Day when the courts open in the fall would be an appropriate time to commence the case. Everyone would then have time to get their dockets lined up and we could proceed at that time.

The Court: Of course, August 4th, you have a vacation problem. Mr. Koskoff, how do you feel about September 2nd?

Mr. Koskoff: As long as it's beyond August 4th or later. I don't think a matter of a couple of weeks makes that much difference. We would agree to September 2nd.

The Court: How about Mr. Burgess?

Mr. Koskoff: He would agree.

The Court: That's no problem as far as he's concerned?

Mr. Koskoff: No. I've discussed that with him, too.

The Court: All right. Now, Mr. Browne, let me hear you.

Mr. Browne: I want to be heard as being vigorously opposed to September 2nd.

The Court: I assumed you would.

Mr. Browne: In fact, I would like the record to show I am as vigorously opposed to June 18th. Your Honor has heard lengthy arguments and your Honor has decided on June 17th.

For the purpose of this motion I would like to cite some dates in connection with Mr. Moeller's motion for continuance which is the motion that was assigned for a hearing this morning.

Appendix D—Excerpt of Transcript, May 5, 1980

Your Honor will note from the court file, and I'm sure your Honor has that court file in front of you, that Mr. Moeller entered a plea of not guilty on April 14th of 1977 or some three years and a month ago. On May 25th of 1977, Mr. Moeller filed a motion to dismiss the proceeding on an allegation of a claim of double jeopardy. On July 7th of 1977, counsel filed a memorandum in support of his motion to dismiss. On August 24th of 1977, the State filed a memorandum in opposition to his motion to dismiss. On December 21st of 1977, the judge denied his motion to dismiss with a written memorandum. On June 6th of 1978, an appeal was filed with the Connecticut Supreme Court relative to the trial court's denial of the motion to dismiss. On June 19th of 1979, the Connecticut Supreme Court released a decision affirming the decision of the judge in the Superior Court denying the motion to dismiss. On September 14th of 1979, Mr. Moeller's counsel filed an application for a petition for certiorari with the United States Supreme Court for a review of the decision of the Connecticut Supreme Court and on November 13th of 1979, the application for certiorari was denied by the Connecticut Supreme Court.

So, this case has been pending initially over three years waiting for a trial and the delay of the case from being tried, obviously, has been a result of counsel exercising his legal prerogatives to file a motion to dismiss, taking an appeal from that motion to the adverse decision and then applying to the United States Supreme Court.

The State is put in a very precarious position because of the long delay in that it's becoming more and more difficult for us to get our witnesses together. Already I can indicate to your Honor at least one individual who would be testifying as a witness for the State has died in the interim and the longer this is delayed, the more

difficult it is going to be for the State to accumulate its witnesses and the more difficult it's going to be on those witnesses to recollect fairly and accurately incidents which have occurred now probably over five years ago. The alleged incident occurred, I can inform your Honor, back in the beginning of 1975. So, it's been over five years since this alleged incident. It makes it all the more difficult for the State to have witnesses who are able to come in here and testify with a good recollection of what has occurred.

Further, I should indicate to your Honor that in my own particular situation I have been sued by one of these defendants and it's been alleged by one of those defendants that I have abused my office and have issued a process against him from malicious purposes and whatnot and, if your Honor please, I'm entitled to some consideration as far as getting this matter resolved as well. I think the disposition of this criminal case is going to have a very heavy bearing on the disposition of the civil case which has been pending against me. I've been sued for a half a million dollars and I think it's a matter, if your Honor please, that I'm entitled to an expeditious disposition of that particular case. I don't want to go on the record and make a personal argument to your Honor, but I think that as far as I'm concerned, this is weightier than the request for a continuance for vacations and teaching at seminars and things of that nature. I think it's more important for me to get that civil matter resolved than it is to have counsel go and instruct seminars somewhere or take a vacation. I put that to your Honor's consideration.

Further, in that motion, in that civil case that has been filed against me, counsel for one of the defendants here has made a request for production and for interrogatories

addressed to myself in which they are, in my opinion, I submit to your Honor a copy of the motion, requesting matters that I think are privileged to the extent that they have a heavy bearing upon the preparation of the State's case for trial here and I don't think that I should be compelled to delay the criminal prosecution while they go through the civil case and require me to submit to them items which I think are privileged matters in connection with the prosecution here.

This case has been pending for five years. Your Honor assigned a trial date of June 17th. The State is ready to proceed. We will never be any more ready than we are at the present time. I don't think the reasons submitted for a continuance are adequate reasons to justify a continuance in the matter and I want to state very emphatically, if I possibly can, that I feel that any continuance anywhere near the date of September is going to put the State in very heavy jeopardy. I'm in a situation where I have reason to believe at least one or more State's witnesses will not be available to the State after the months of July and August and I want to be recorded as emphatically as I can for the reasons that I have stated as saying this case should start as scheduled or as shortly thereafter as possible and in no event should this case be continued to September. That's my position.

The Court: Thank you.

Mr. Koskoff: Your Honor, may I respond just briefly?

The Court: Yes. Certainly.

Mr. Koskoff: I don't know just how to say this. It's clear to me that Mr. Browne feels personally involved. If he feels that personally involved, he's looking for justification for his actions from the results of this case, he ought to disqualify himself because he has expressed to you a personal motivation.

The Court: I think Mr. Browne is quite capable of making that decision, Mr. Koskoff, without help from either you or I.

Mr. Koskoff: I'm not sure it's a matter of the defendants as well, in any event, the delay, I should call to the Court's attention, that Mr. Moeller, who was indicted in the Federal Court and tried and found not guilty, was not arrested in the State case until some almost three years, I think, after '77 was the— He was arrested— What was the date?

Mr. Browne: He was arraigned on April 4th of 1977. So, I would assume he was arrested within days.

Mr. Koskoff: So, you know, it is true what Mr. Browne said about the fact that we did take these steps which any lawyer would have taken.

Mr. Browne: I'm not being critical of the motions or the fact that the appeals were taken as Mr. Koskoff says. Those were legitimate pleadings and I'm just trying to explain to your Honor why it has taken this length of time.

The Court: I understand.

Mr. Browne: Again, my personal situation is not, I'm not asking your Honor to really give that any consideration. I'm just trying to tell your Honor my position. The incident occurred five years ago. The case has been pending here for over three years. There are relevant reasons why this case should be expeditiously tried, particularly, the ability of the State to get its witnesses here and I think that it is a more over-weighing factor and superior to the fact of vacations or teaching or participating in seminars. That's my opinion. I'm not going to take any vacation this year. I've got my duty here to put this on and that's what I'm intending to do.

Office - Supreme Court, U.S.
FILED
JUL 23 1982
ALEXANDER L. STEVAS,
CLERK

81-2360

NO.'S

In The

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES D. MOELLER and LOWELL POWELL,
Petitioners

VS.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Although the Petition for Writ of Certiorari is filed pursuant to the jurisdictional statement invoking 28 U.S.C. §1257(3) was the proffered federal question duly raised in the state court.

II. Assuming the invocation of the due process clause of the Fourteenth Amendment in the state court does it require the state courts to review the denial of motions to disqualify counsel on an interlocutory basis even though the individual state's appellate procedure mandates that an appeal be taken from a final judgment.

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STATEMENT OF THE CASE

The instant petition has its genesis in a holocaust which occurred on March 1, 1975, at Plant No. 4 of the Sponge Rubber Products Company located in Shelton, Connecticut. The conflagration consumed a large portion of the facilities. Several individuals were indicted and stood trial in the United States District Court for the District of Connecticut at New Haven. Petitioner Moeller was acquitted in that trial. Petitioner Powell was neither arrested nor indicted by the federal government. The background of the case and the roles of the various defendants can be found in *United States* v. *Bubar,* 567 F.2d 192 (2d Cir. 1976). Moeller was arrested on May 3, 1977, by Connecticut authorities and charged with conspiracy to commit arson in the first and second degrees. *Conn. Gen. Stats.* §§53a-48, 53a-

111; and 53a-112. Moeller was the president of the corporate owner of the property. Powell was arrested on March 10, 1977, and was accused of conspiracy to commit arson in the second degree. *Conn. Gen. Stats.*, §§53a-48 and 53a-112. This Court previously denied certiorari in Moeller's claim of double jeopardy. *State* v. *Moeller,* 444 U.S. 950 (1979). Despite the fact that the arrests occurred over five years ago neither petitioner has been tried in the state court.

On February 22, 1980, petitioner Powell filed a civil rights suit under the aegis of 42 U.S.C. §1983 against the State's Attorney who was the sole prosecutor involved in the prosecution of the petitioners. The suit alleged that the prosecutor in an investigative and administrative capacity edited and prepared an affidavit to be used in the arrest process and that its preparation and submission were under circumstances which were in reckless disregard of its truth and reliability. The federal district court stayed the civil rights action until the resolution of the criminal case. These motions to disqualify the prosecutor and his staff arose out of a hearing before the trial court on May 5, 1980, the purpose of which was to, inter alia, establish a date for trial. During that colloquy the State's Attorney did refer to the pending civil rights suit initiated by Powell. The dialogue can be found in Petitioner's Appendix D and in *State* v. *Powell,* 186 Conn. 547, 549 n.5, 442 A.2d (1982). Subsequent to this hearing each petitioner filed a motion to disqualify the prosecutor and his staff. The motions were argued and briefed and the trial court took testimony. *State* v. *Powell,* supra, n.6. The motions to disqualify were denied and the petitioners appealed to the Connecticut Supreme Court. During oral argument before that court the court sua sponte raised the jurisdictional issue of whether the appeal was from a final judgment and requested supplemental briefs. The Connecticut Supreme Court concluded that the appeals were not from final judgments but were interlocutory and dismissed the appeals. The opinion of the Connecticut Supreme Court was founded solely on its interpretation of state law as it defined the term "final judgment." Petitioners have now sought a writ of certiorari to the Supreme Court of Connecticut.

ARGUMENT

I.

The petitioners in their Statement of Jurisdiction cite 28 U.S.C. §1257(3). That statute confers jurisdiction by writ of certiorari in the following situations:

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

This statutory subdivision has been interpreted to mean that a federal question must have been duly raised in the state court. A reading of the opinions of the state courts clearly indicates that no federal issue was decided. In fact the only time a federal question was invoked is in the phrasing of the issue by the petitioners in their petition for writ of certiorari. The Connecticut Supreme Court decided the issue of finality by interpreting its own court rule and statute on the subject. No federal statute, treaty, or constitutional provision was a factor in the case which was decided on state grounds. Although some federal cases were cited by the court their holdings were not necessary to the court's reasoning. As in *Cardinale* v. *Louisiana,* 394 U.S. 437, 438 (1969) the sole federal question urged there had never been raised, preserved, or passed upon in the state court and it has been long established that the Court will not decide federal issues raised here for the first time on review of state court decisions. See *Monks* v. *New Jersey,* 398 U.S. 71 (1970). In *Honeymom* v. *Hanan,* 300 U.S. 14, 18-19 (1937), the Court stated that it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the fed-

eral question was necessary to the determination of the cause. 12 *Moore's Federal Practice,* §510.01.

Absent a federal question or issue which was briefed, argued and decided before the state court it would appear that this Court is without jurisdiction to entertain the petitions for writs of certiorari. A last minute attempt to interject an issue by utilizing the petitions should not avail to remedy the deficiency.

II.

Of significance at the outset is the reiteration that *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. 368 (1981) was an appeal from a judgement of a court of appeals which reviewed a district court's interpretation of the federal statute which limited appeals from the lower court to "final decisions." The opinion is written on non-constitutional grounds and in reality the entire opinion centers on the Court's evaluation of the language contained in 28 U.S.C. §1291. In comparison the case sub judice was decided by the Connecticut Supreme Court on the non-constitutional basis of the interpretation of the state law encased in a rule of court and a state statute. *Conn. Practice Book* §3000 and *Conn. Gen. Stat.* §52-263; see Petitioners Appendix 4a. No federal question was presented since the determinative issue was solely one of state law. The leading federal and Supreme Court cases discussed by the court were only within the context of legal analogy and not in the sense that they were binding on the court. The Moeller and Powell cases are a matter of state law pure and simple.

In *Firestone Tire & Rubber Co.* v. *Risjord,* supra, 372 n. 8, this Court expressly stated that it did not "express any view on whether an order denying a disqualification motion in a criminal case would be appealable under §1291." Two thoughts spring from this footnote. One is that the Court is known not to give advisory opinions but stresses to respond only to the legal issue(s) before it and secondly it is clear that the Court was only guiding its opinion by its interpretation of a federal statute and its meaning as used in the federal court system.

In *Firestone Tire & Rubber Co.* v. *Risjord,* supra, this Court was giving a meaning within a specific fact situation to the term "final decisions" as expressed in 28 U.S.C. §1291. Reviewing an order in a civil case denying a motion to disqualify counsel the Court made a determination as to whether this action fell within the restricted class of cases in which appeals are permitted even though the order did not terminate the litigation but was still final and appealable under 28 U.S.C. §1291. In *Moeller* and *Powell* the Connecticut appellate court was applying the term "final judgment" as used in its rules of practice and its statute permitting review of judicial decisions. Neither case seems to be predicated on constitutional principles but rather concern the construction of federal law and state law respectively.

In *Armstrong* v. *McAlpin,* 625 F.2d 433 (2d 1980), the United States Second Circuit Court of Appeals overruled an earlier decision and declared orders denying disqualification motions would not be appealable. Although the case concerned an action for damages for violation of the securities law the court enunciated very cogent reasons not to permit the interlocutory appeal of such motions. They distinguished the appealability of motions which grant the disqualification because such orders "seriously disrupt the progress of the litigation and decisively sullies the reputation of the affected attorney." *Armstrong* v. *McAlpin,* supra, 437. There was also expressed the concern of the court that "the availability of an immediate appeal has seemingly contributed to the proliferation of disqualification motions and the use of such motions for purely tactical reasons such as delaying the trial." Such appeals freeze the litigation. It would further be urged that the denial of a motion to disqualify is not the source of irreparable harm since an appellate court is empowered to declare a new trial in appropriate situations. *Armstrong* v. *McAlpin,* supra, 437-438. The fact that a denial of the motions does not affect the ultimate final review should there be a conviction. See concurring opinion of Justice Peters, Petitioners' Appendix, 9a. To endow the defense in a criminal case with the right to seek interlocutory appeals in cases of possible prosecutorial disqualification would place in their hands

insurmountable roadblocks to the achievement of justice. With this tool they could inexorably dictate the timing of trials and ultimately whether or not a trial could be had.

Distinguished from the instant case are those cases which serve to vindicate fundamental constitutional rights. Included in this case are an order denying a defendant's claim that an impending trial will place him twice in jeopardy, *Abney* v. *United States,* 431 U.S. 651 (1979); an order denying a motion to reduce bail, *Stack* v. *Boyle,* 342 U.S. 1 (1951); and where a Congressman asserts the immunity of the Speech and Debate Clause of the Constitution. *Helstoski* v. *Meanor,* 442 U.S. 500 (1979). Precluded have been orders concerning pretrial discovery, *United States* v. *Ryan,* 402 U.S. 530 (1971); and a pretrial order denying a motion to dismiss an indictment due to an alleged violation of the right to a speedy trial. *United States* v. *MacDonald,* 435 U.S. 850 (1978) and indeed this term the Court in a per curiam opinion denied the right to take an interlocutory appeal on the claim of prosecutorial vindictiveness. Citing *Dibella* v. *United States,* 369 U.S. 121, 124 (1962), the Court opined that piecemeal appellate review was least desirable in the criminal field. *United States* v. *Hollywood Motor Car Company, Inc.,* 81-1133 (1982).

In interpreting the leading case of *Cohen* v. *Beneficial Industrial Corp.,* 337 U.S. 541 (1949) the test set forth therein has been simplified to mean that collateral orders may be appealed if (1) the order conclusively determines the disputed questions, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468 (1978). Even if we assume the fulfillment of the first two requirements of *Cohen* it would seem that the denial of a motion to disqualify a prosecutor is an issue which can be effectively reviewed on appeal. To date the only behavior of the prosecutor which is questioned by the defendants is his reference to a civil rights suit filed by one of them. This reference came during a discussion in court of a trial date. The court record will reflect that the early trial date sought by the prosecu-

tor was not granted by the court. Thus in this instance there was no conceivable harm to the defendants. Should trial be held clearly the trial judge and the appellate court would be impartial arbiters of his conduct. Any wrong could be rectified by one or the other.

This case is not a routine criminal prosecution. It will be necessary to call an unusual number of witnesses and proffer innumerable exhibits. The prosecutor whose actions are the subject of this motion is the only state prosecutor who has developed the case and investigated it since the fire in 1975. To disqualify him might effectively terminate the efforts of the state to prosecute the defendants. The complexity of this litigation can be appreciated by its factual recitation in *United States* v. *Bubar,* 567 F.2d 192 (2d Cir. 1976). Against this loss we must weigh the speculative claim of future harm to the defendants. It is submitted that at this time the claims of the defendants are minimal in the face of the probable damage to the criminal justice system if this interlocutory appeal were to be permitted.

CONCLUSION

The State of Connecticut respectfully represents that there is no constitutional issue raised by this case and urges this Court to deny the Petition for Certiorari.

Respectfully submitted,

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Assistant State's Attorney
Judicial District of
Fairfield Part A

CERTIFICATION

This is to certify that three copies of the foregoing have been mailed this date, postage prepaid, to Attorney Thomas Nadeau, 55 Chapel Street, Bridgeport, Connecticut 06604 and Attorneys Alexander Harinstein and John A. Burgess, 181 Middle Street, Bridgeport, Connecticut 06604.

July 22, 1982

/s/Richard F. Jacobson
RICHARD F. JACOBSON